

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 4, 2000
Case Nos: 2000-INA-260

In the Matter of:

PRECON PRODUCTS, LTD.
Employer

On Behalf of:

ROGELIO HERNANDEZ-GUTIERREZ
Alien

Appearance: David Neumeister, Esq.
for the Employer and the Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Rogelio Hernandez-Gutierrez ("Alien") filed by Employer Precon Products Ltd. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On May 10, 1996, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Welder-Assembler for Employer's business of manufacturing quality precast concrete products.

The duties of the job offered were described as follows:

Assembles and tack-welds steel frames and other component parts of machinery and equipment in preparation for final welding. Measures and marks locations for metal components on assembly table, following blueprints. Lifts and positions components on assembly table using electric crane, jacks and shims. Verifies position of metal components in assembly, using straightedge, combination square, calipers, and rule. Clamps metal components to assembly table for welding. Removes rough spots from castings, using portable powered grinder and hand file, to fit and assemble parts. Tack-welds parts in preparation for final welding. Moves assembly to storage area, using electric crane.

No formal education and two years experience in the job, or the related job of welder were required. Wages were \$7.55 per hour. The applicant supervises no employees and reports to the owner. (AF-24-69)

On October 29, 1997, the CO issued a NOF proposing to deny certification. The CO found that Employer had rejected U.S. applicants James R. Moore and Cesar A. Nunez in violation of 20 CFR 656.21(b)(6). The CO stated: "According to 20 CFR 656.24(b)(2)(ii), the Certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties

involved in the occupation as customarily performed by other U.S. workers similarly employed." With respect to Mr. Moore, the CO stated: "The employer indicates that he contacted Mr. Moore by telephone and that instead of returning the employer's call, Mr. Moore 'dropped in unannounced.' The employer states that although he has many years of experience as a welder, he has no experience with the employer's concrete products. The employer states that Mr. Moore told him he was working at the time and not interested in changing his employment." The CO went on to state that in response to their questionnaire signed by Mr. Moore on April 10, 1996, Mr. Moore stated that he felt he met the requirements of the job, that he was not hired and that Employer would call him if he got the job. Since the ETA 750 A gave alternative job experience for the job as a welder, the employer's attempt to disqualify him for lacking experience with cement products, an undisclosed requirement, cannot be accepted. With respect to Mr. Nunez, the CO noted that Employer had forwarded a letter dated December 8, 1995 to Mr. Nunez, but no evidence of when it was sent or if it was received and when telephone calls were made. Mr. Nunez replied to a questionnaire that he was never contacted. Corrective action required was persuasive rebuttal that these two applicants were recruited in good faith and rejected for lawful, job-related reasons. (AF-19-22)

On December 2, 1997, Employer forwarded its rebuttal stating that he had "...no argument with Mr. Moore's statement that he met the requirements of the job offer. Indeed he did since he had several years of experience as a welder. However, his experience was very different than that which he would be doing for this company. Mr. Moore clearly stated that he had no experience whatsoever in welding cement molds. In fact, he had never worked with concrete products at all. However, as I stated in my letter to Mr. Diaz of February 20, 1996, Mr. Moore told me that he was no longer interested in pursuing this job opportunity. Consequently, I suppose Mr. Moore is telling the truth when he states that I did not offer him the job. Nevertheless, the reason I did not pursue the possibility of offering Mr. Moore this job was that he clearly indicated that he was elsewhere employed and no longer interested in this position. I cannot understand Mr. Moore's statement that I told him I would call him if he got the job. It is simply not true. In fact, when I received your Notice of Findings, I telephoned Mr. Moore in order to straighten out this misunderstanding. Unfortunately, every time that I telephoned him during business hours, I encountered his telephone answering machine. Although I have left several messages for Mr. Moore, he has never called back. Just prior to writing this letter, I telephoned Mr. Moore in the evening and reached a woman who stated that Mr. Moore was out of town 'on a job'. Naturally, I am distressed by Mr. Moore's responses to the questionnaire sent him by EDD. I enjoyed my conversation with him and felt we

parted on good terms. I have no idea why he responded to the questionnaire the way he did. However, once again, I assure you that Mr. Moore clearly indicated that he was not interested in the position offered in this application". As to Mr. Nunez, Employer stated: "I specifically remember leaving two telephone messages on Mr. Nunez's answering machine. In addition I sent him a letter of invitation to an interview on December 8, 1995. I am certain the letter went out on either the date it was written or the very following day. Unfortunately, it is impossible to document these facts for you, since Mr. Nunez's phone number is a local call and I did not send the letter by certified mail. If Mr. Nunez never received my messages or my letter, it is not because of any negligence or lack of effort on my part. Since your Notice of Findings indicates that 'untimely contact is not considered a remedy,' I did not attempt to contact Mr. Nunez after receiving your notice." (AF-37-42)

On April 16, 1998, the CO issued a Final Determination denying certification, stating that Employer's rebuttal failed to provide documentation sufficient to overcome Mr. Nunez's statement that he was not contacted. With respect to Mr. Moore's application, the CO was skeptical of Employer's statement that Mr. Moore refused the job since Mr. Moore showed his strong interest by actually going to the work site for an interview. Additionally, Employer gave an account of Mr. Moore not having experience related to concrete or cement which would tend to show applicant was being discouraged from accepting the job. The CO stated: "If the employer had offered him the job, and if he had clearly known it was being offered to him and clearly turned it down, we could find in the employer's favor". However, since "... too much was left out to find Employer's version was correct..." Employer had not carried its burden.(AF-11-13)

On May 19, 1998, the Employer filed a request for reconsideration of denial of labor certification including a letter from Mr. Moore dated April 29, 1998 which stated in its entirety: "As you requested in our conversation yesterday, I am writing to confirm that I did interview for a welding position with your company back in late 1995. During that interview, I told you that I was hoping to find a position in quality control, either as a welding inspector or as a welding technician. Since I was already working as a welder earning more than the job offered, I told you that I was not interested in starting over as a welder/assembler, working with concrete products. I am sorry about the confusion about the card I sent back to Sacramento. It seems to me that I told them that you did have a position open for an Inspector or Quality Control Welding Technician and that you would let me know if such a position opened. In fact I am now in the process of moving out of state to take a job as a Quality Control Welding Inspector." On November 11, 1998 Employer made a

second request for reconsideration or in alternative a petition for review to this Board. A third request was mailed November 19, 1999. (AF-1-10)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the board. Barbara Harris, 1988-INA-32 (1989).

The regulations require that the job opportunity must be open to any qualified U.S. worker. 656.20(c)(8). An employer must show that U.S. workers were rejected solely for lawful job related reasons. 656.21(b)(6). Therefore, an employer must take steps to ensure that it has obtained lawful job related reasons for rejecting U.S. applicants and not stop short of fully investigating an applicant's qualifications. An employer that does not make more than unanswered calls or only left messages has been held to have not made a reasonable effort to contact the U.S. worker where an address was available for the applicant. Any Phototype, Inc. 1990-INA-63 (May 21, 1991); R.E.Haight Assoc., 1998-INA-171 (May 21, 1999).

With respect to applicant Moore, the CO has based her determination in substantial part on the applicant's apparent desire to obtain the job by actually visiting the workplace and the Employer's apparent rejection of applicant Moore for not having expertise in welding in a concrete making plant. The CO has assumed that Employer rejected Moore because of his lack of expertise in this area of welding. It is equally plausible, however, and not contradicted, that Mr. Moore having visited the plant was not desirous of pursuing this particular employment and used as an explanation to Employer that he was already employed. Thus there is not necessarily a contradiction between Employer's statements and the questionnaire returned by Moore. Moreover, Employer in his rebuttal stated in apparent good faith detailed information of his unsuccessful telephonic attempts to reach Mr. Moore to clarify the matter. Further Employer's explanation that Moore had a better paying job with a higher level of experience required at the time of application is suggested by his resume of record. We believe, therefore, given the circumstances of an unresolved conflict of contentions that the CO should have taken under advisement Employer's motions for reconsideration containing information apparently unobtainable by Employer despite Employer's considerable efforts under the time

constraints given for rebuttal. In that connection, we note that Mr. Moore has subsequent to his application obtained employment which gives more value to his experience as an inspector which he had already obtained at time of application in addition to his experience as a welder.

Under the circumstances, the matter is remanded to the CO for her redetermination of whether or not Mr. Moore had been unlawfully rejected or whether he had lawfully voluntarily withdrawn his application. The additional information furnished by Employer in his petition for review should be considered in this determination, including whether or not the CO finds it credible and/or whether more information is desired. If a finding on that issue is favorable to Employer, the CO should reconsider whether or not Employer's explanations concerning the application of Mr. Nunez were made in good faith or would be, standing alone, a basis for denial of labor certification.

ORDER

The CO's decision is vacated and this matter remanded for appropriate action.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge